

The Honorable Tana Lin

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA,**Plaintiff,****v.****KEITH RUSSELL,****Defendant.****NO. 23-cr-00142-TL**

**DEFENDANT’S REPLY IN SUPPORT
OF MOTION TO SUPPRESS
EVIDENCE AND FOR *FRANKS*
HEARING**

**Noted on Motion Calendar:
April 26, 2024**

I. REPLY

Throughout its Opposition to to Defendant’s Motion to Suppress and Motion for *Franks* Hearing (“Opposition,” Dkt. 45), the Government conveniently ignores salient facts and on-point caselaw. In light of all the relevant facts, the officers in this case unlawfully extended the duration of the traffic stop, performed unlawful searches, arrested Mr. Russell without probable cause, and made knowing or recklessly false statements in a warrant affidavit. All evidence must be suppressed.

A. The Duration of the Stop Cannot be Justified by its Asserted Bases

1 **1. The Extended Stop Cannot be Justified by the Supposed Blocking**
 2 **Traffic Infraction, Because the Officers Made No Attempt to**
 3 **Address It**

4 The Government argues that the stop¹ of Mr. Russell was justified by probable cause to
 5 believe that he had committed two infractions: allegedly blocking traffic, and allegedly failing to
 6 display a license plate. As an initial matter, it should be noted that the officers claim to have seen
 7 Mr. Russell's car in same place on two occasions in time separated by approximately 10 minutes,
 8 describing him as "blocking traffic."² What they cannot say with any personal knowledge is
 9 whether Mr. Russell had moved his car in the interim and returned to the intersection to wait for
 10 a chance to turn onto Aurora Avenue North. It should also be noted that the cruiser dash camera
 11 video submitted by the Government makes it clear that Mr. Russell's car was not blocking any
 12 traffic.³ Finally, the complaints referenced by the Government (Dkt. 45 at 2) were called in at
 13 some unspecified prior occasion, rather than concerning Mr. Russell on this occasion.⁴ Given
 14 these facts, the defense position is that there was no probable cause to stop Mr. Russell for
 15 "blocking traffic." In any case, at no point in the subsequent interaction did either officer show
 16 the slightest interest in "investigating" or otherwise addressing the supposed blocking traffic
 17 infraction.

18 The scope of a traffic or investigatory stop "must be carefully tailored to its underlying
 19 justification" and "last no longer than is necessary to effectuate the purpose of the stop."

20 *Rodriguez v. United States*, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492, (2015), citing

21 _____
 22 ¹ In its Opposition, the Government asserts that the "officers activated the patrol vehicle's emergency lights and
 23 attempted to conduct a traffic stop of the Volvo as it pulled onto Aurora Avenue North" (Dkt. 45 at 3). In fact, the
 24 officers followed Mr. Russell for 12 blocks before activating their lights, observing no traffic infractions during that
 time. Dkt. 35 at 2-3 and citations therein.

² See Dkt. 36-1 at 2.

³ See Docket 43-1 (Government's Opposition Exhibit A), at 00:00-00:10; Reply Declaration in Support of Motion to
 Suppress Evidence and for *Franks* Hearing ("Carney Reply Decl.") at Exh A.

⁴ See Docket 36-1 at 1, 21.

1 *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). Like a Terry stop,
 2 “the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s
 3 ‘mission’—to address the traffic violation that warranted the stop[.]” *Rodriguez*, 575 U.S. at 354.
 4 Because addressing the infraction is the purpose of the stop, it may “last no longer than is
 5 necessary to effectuate th[at] purpose.” *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct.
 6 1568, 84 L.Ed.2d 605 (1985); *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d
 7 229 (1983). Authority for the seizure thus ends when tasks tied to the traffic infraction are, or
 8 reasonably should have been, completed. *Sharpe*, 470 U.S. at 686 (in determining the reasonable
 9 duration of a stop, “it [is] appropriate to examine whether the police diligently pursued [the]
 10 investigation”).

11 The officers here made no effort whatsoever to address the supposed blocking traffic
 12 violation, diligent or otherwise. The continuation of the stop beyond the duration necessary to
 13 determine that Mr. Russell was in fact displaying a temporary license placard cannot be justified
 14 by an alleged violation that the officer clearly never had any intention of investigating.

15 **2. Once the Officers Confirmed the Presence of a Temporary License** 16 **Plate, the Traffic Stop Was Required to End**

17 As reflected in Dkt. 36-3, a photo taken on the day of Mr. Russell’s arrest plainly shows
 18 there was a temporary license placard displayed in the lower left of the rear window of the
 19 Volvo. The Government’s Opposition shows precisely as much interest in this critical fact as did
 20 Officers French and Lentz, to wit: none whatsoever.

21 The Government makes no mention of the nationwide cases cited for the proposition that
 22 if a stop is predicated on the absence of a license plate, it must end when the presence of a
 23
 24

temporary plate is discovered.⁵ As shown in Docket 35-3, there plainly was a temporary license plate displayed in Mr. Russell's car, a fact that was ignored both by the officers and the Government in its opposition. As discussed in the motion to suppress, the readily-apparent temporary license plate on Mr. Russell's car dissipated probable cause to stop him and all evidence recovered after that point should be suppressed.

B. An Object is not in "Plain View" if Police Officers Must Perform an Unlawful Intrusion or Move Other Objects in Order to See It

The Government insists in its Opposition that the gun under the driver's seat was "in plain view." This abbreviated analysis overlooks critical facts. First, Officer Lentz opened the door of Mr. Russell's car, before later physically intruding into the vehicle to search it.⁶ The Government's Opposition (Dkt. 45 at 5) makes much of the fact that Mr. Russell reopened the door to get his registration and proof of insurance, claiming that this was "after Officer French instructed him not to do so." This slanted recitation of the facts ignores the reality that Mr. Russell asked Officer Lentz if he should return to the vehicle get the documents and was instructed by Officer Lentz to do so.⁷ As discussed in Docket 35 at 6-9, thereafter both officers physically prevented the driver's door from being closed by the positioning of their bodies and by placing their hands on the interior of the door. The Government's Opposition offers no discussion of these facts.

Most significantly in this context, the videos of the incident, and his own words, show that Officer Lentz was unable to see the gun until Officer French returned to the vehicle, placed his hand on the interior side of the driver's door, and pushed it farther open.⁸ The Government

⁵ See Dkt. 35 at 13-17.

⁶ Dkt. 43-1 at 02:17-02:31; See also Dkt 35 at 17-18; *United States v. Ngumezi*, 980 F.3d 1285 (9th Cir. 2020).

⁷ See Dkt. 36-6 at 02:36-04:41.

⁸ See Dkt. 35 at 6-9 and exhibits cited therein.

ignores this fact, insisting only that the gun was in “plain view” at the moment when Officer Lentz finally saw it. While technically true, this is equally true of every item that has ever been unlawfully seized during an unconstitutional search and avails the Government nothing. The Government’s claim of “plain view” misses the mark because the video shows that the gun was only found because Officer French *moved the door* to facilitate the officers’ ongoing search.

An officer may not simply move other objects in order to make the object of his search visible. *U.S. v. Washington*, 387 F.3d 1060, 1071 (9th Cir. 2004)(citing *Arizona v. Hicks*, 480 U.S. 321, 326, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987)). The *Washington* court explained that *Hicks*⁹ stands for the proposition that “moving something even a few inches constitutes a search...” (Emphasis added). In its discussion of this issue, the *Ngumezi* court acknowledged that “[a]lthough the intrusion here may have been modest, the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis.” *Ngumezi*, 980 F.3d at 1289.

It bears repeating in this context that the *Washington* court held that “plain view” does not authorize officers to act without lawful authority to keep the door to a protected area open, and then use that line of sight to claim “plain view” of contraband:

After Washington's friend, Nolan, exited the room, the officers refused to let Nolan close the door[.] Officer Sceirine testified that, with the door open, the officers "had a fairly ample view of the room." Whether a hotel room door is opened in response to a threat or a command or is kept open against the wishes of the room's occupant, police officers obtain visual access to the room by using their power to require that the door *be* open. Both scenarios result in a search within the meaning of the Fourth Amendment, and both scenarios require consent, a warrant, or probable cause plus an exception to the warrant requirement. Here, the officers possessed none of these legal grounds for gaining visual access to Washington's room. Thus, the officers

⁹ “[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry.” *Hicks*, 480 U.S. at 325.

1 violated Washington's Fourth Amendment rights when they gained visual access to
2 his room by refusing to let Nolan close its door.

3 *Washington*, 387 F.3d at 1070-1071.

4 The Government offers no discussion of the fact that both Officers unlawfully controlled
5 the driver's door of Mr. Russell's car to facilitate their search. Similarly, the Government offers
6 no rationale to distinguish *Ngumezi* and *Washington*. Because the gun was only visible and only
7 found because of the officers' manipulation of the door to make it visible, the discovery of the
8 gun is the product of an unlawful search and it must be suppressed.

9 **C. There was no Probable Cause for Marijuana DUI**

10 The Government acknowledges that following Officer Lentz's extended contact with Mr.
11 Russell, Officer French asked Officer Lentz if he saw any evidence of impairment.¹⁰ What the
12 Government conspicuously omits is Officer Lentz's response. Officer Lentz, having spoken to
13 Mr. Russell at close range for several minutes, responded that he had not seen evidence of
14 impairment.¹¹ The Government offers no discussion of why Officer Lentz might have failed to
15 notice the "watery bloodshot eyes" that Officer French later claimed to see. The Government
16 also claims that "there is no valid evidence supporting Russell's claims that his eyes were
17 not bloodshot, watery, or droopy."¹² This contention simply ignores the screenshot from Officer
18 Lentz's body camera, clearly showing Mr. Russell's clear, wide-open eyes from close range¹³,
19 and likewise offers no explanation for the fact that Officer Lentz, undoubtedly having been
20 trained to notice such evidence if it were present, failed to mention it when directly asked about
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23 ¹⁰ Dkt. 45 at 5 ("When Officer French returned to the Volvo with Russell's license, he inquired of Officer Lentz
24 about whether or not he could tell if Russell was impaired.")

¹¹ See Dkt. 35 at 7 and citations therein (I can't tell. I don't know.).

¹² Dkt. 45 at 22.

¹³ See Dkt. 36-8.

1 evidence of intoxication by his partner. Finally, the Government offers no explanation for the
2 contradiction between the video evidence showing no object being flicked out of the car at any
3 point and Officer French's contemporaneous failure to mention any such event on the one hand,
4 and his later claim that he saw a lit object being thrown from the car on the other.¹⁴

5 The Government claims that the manner in which Mr. Russell prepared to pull over in
6 response to the officers' activating their lights shows impairment.¹⁵ Mr. Russell was driving
7 within the speed limit and within his lane without any swerving. There was a steady flow of
8 traffic in the lane to his right, but an open left turn lane leading to a side street and parking lot
9 immediately available to Mr. Russell after the lights went on. As there was very limited space on
10 the right shoulder of the road on the block where the lights were activated, Mr. Russell signaled
11 left, slowed down, and stopped to wait for the left turn arrow to change to green, rather than
12 turning left across a steady stream of oncoming traffic. It was at that moment that Officer Lentz
13 activated the siren, which Mr. Russell reasonably interpreted as an escalation and responded by
14 remaining still and putting his hands out the window. It was at that moment that the officers
15 made the choice to exit their cruiser and approach Mr. Russell's car in the street. There is
16 nothing in this sequence of events that suggests Mr. Russell was impaired.

17 Furthermore, even assuming that Officer French's assertion about Mr. Russell's eyes did
18 not contradict the available evidence, such evidence has already been held by the Ninth Circuit
19 not to constitute probable cause for a marijuana DUI arrest. *USA. v. Patzer*, 277 F.3d 1080, 1084
20 (9th Cir. 2002).
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¹⁴ See Dkt. 35 at 3-4, and exhibits cited therein.

¹⁵ See Dkt. 43-1 at 01:02-01:52.

1 The Government fails to even mention *Patzer*, let alone distinguish its near-identical facts
 2 and analysis. Just as in *Patzer*, there was not sufficient evidence to establish probable cause to
 3 arrest Mr. Russell for marijuana DUI, and all evidence recovered as the fruit of that arrest must
 4 be suppressed.

5 This remains true notwithstanding the Government's puzzling claim that "[d]uring a
 6 search incident to arrest, what appears to be a marijuana blunt was removed from Russell's
 7 pocket and placed on the hood of the patrol car."¹⁶ Certainly, any object only recovered during a
 8 search incident to arrest cannot justify the arrest that preceded its discovery. Equally important,
 9 the object was not a blunt. The officers photographed all the evidence they seized from Mr.
 10 Russell and his vehicle, and did not include whatever object the Government is referring to.¹⁷
 11 Obviously, if the object had been a blunt that had been smoked, the officers would have
 12 documented it and included it in their reports. They did not, because it was a stray object of no
 13 evidentiary value.

14 **D. Mr. Russell is Entitled to a Hearing Pursuant to *Franks v. Delaware***

15 In *United States v. Stanert*, 762 F.2d 775, 780–781 (9th Cir. 1985), *opinion amended*, 769
 16 F.2d 1410, the Ninth Circuit laid out the standard for when a *Franks* hearing should be granted:

17 The Court in *Stanert* stated, in describing the showing necessary to obtain a hearing:

18 Clear proof of deliberate or reckless omission is not required. *See United States v.*
 19 *Chesher*, 678 F.2d 1353, 1362 (9th Cir. 1982). Such proof is reserved for the
 20 evidentiary hearing. *Id.* At this stage, all that is required is that the defendant make
 21 a substantial showing that the affiant intentionally or recklessly omitted facts
 22 required to prevent technically true statements in the affidavit from being
 23 misleading.

24 *Stanert*, 762 F.2d at 781.

¹⁶ Dkt. 45 at 8-9.

¹⁷ See Carney Reply Decl. Exh B.

1 The defective warrant affidavit in this case was emailed to the magistrate at 02:54am on
2 July 17, 2023, approximately 90 minutes after Mr. Russell's arrest.¹⁸ It is difficult to conceive of
3 evidence more suggestive of reckless or deliberate falsehood than the existence of multiple
4 videos capturing the entire event and showing the affiant officer *personally witnessing* events
5 that he significantly misrepresented an hour and a half later. Officer French included statements
6 he had to have known were false, because he was a participant in the conversation he reported
7 and a witness to the events that actually occurred, very shortly before he made the false
8 statements and omissions. If these facts do not constitute a sufficient showing to justify a *Franks*
9 hearing, it is hard to see how any facts ever could, short of an officer recording in a report that he
10 *subjectively intended* to deceive the magistrate by deliberately including false information or
11 omitting material information.

12 As to the materiality of the statements, the false allegations that Mr. Russell's "eyes were
13 watery and bloodshot, and his eyelids were droopy" and that "he admitted smoking cannabis *one*
14 hour before we stopped him" are effectively the only information in the warrant affidavit that cut
15 in the direction of the existence of probable cause for DUI. Combined with the omission of the
16 fact that the "blunt" found in the car had never been lit, implying that it had been freshly smoked,
17 and likewise the omission of the fact of ordinary, competent driving for the twelve blocks the
18 officers followed Mr. Russell, these statements are the core of the allegation of probable cause.
19 The statements and omissions are patently material.
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21 Mr. Russell has met his burden of showing that the false statements and misleading
22 omissions in the warrant affidavit are material and that Officer French's failure of candor to the
23 magistrate was reckless or intentional.
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¹⁸ Dkt. 36-7 at 1.

E. The Good Faith Doctrine is Inapplicable to These Facts

Officers are entitled to the benefit of good faith reliance on a warrant *only* where the issuance of the warrant did not contravene “clearly established” law. *U.S. v. Brown*, 951 F.2d 999, 1007 (9th Cir. 1992).

To “determine that the law was clearly established, we need not look to a case with identical or even ‘materially similar’ facts.” *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003)(Citing *Hope v. Pelzer*, 536 U.S. 730, 739-741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-1137 (9th Cir.2003). Rather, “the ‘standard is one of fair warning: where the contours of the right have been defined with sufficient specificity that a state official had fair warning that [his] conduct deprived a victim of his rights[.]’” *Id.*

As discussed above, the Ninth Circuit has clearly established law on strikingly similar facts to those alleged in the warrant affidavit, in *USA. v. Patzer*. While no two cases are truly and literally identical, the facts of *Patzer* and the Ninth Circuit’s holding that they did not support probable cause for a marijuana DUI are certainly similar enough to provide “fair warning” to Officers French and Lentz that any search warrant based on substantially identical factual allegations would be unlawful. Thus, they were not entitled to rely on the warrant in “good faith.”

I. CONCLUSION

Officers French and Lentz unlawfully prolonged the stop of Mr. Russell’s car, conducted unlawful searches of his car, arrested him in the absence of probable cause, and then procured a warrant by means of an affidavit riddled with false statements and omissions. All evidence should be suppressed.

1 DATED this 26th day of April, 2024.

2 Respectfully submitted:

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10 This filing contains 3,148 words, in
11 compliance with the local rules as enlarged by
12 the Defendant's motion to file an overlength reply
13 brief.
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